SGS v Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction

Summary: SGS claimed in respect of Philippines' failure to make payment of invoices pursuant to a contract both had entered into for SGS to provide pre-shipment inspection services.

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Washington D.C.

Case N° ARB/02/6

SGS Société Générale de Surveillance S.A.

(Claimant)

versus

Republic of the Philippines

(Respondent)

DECISION OF THE TRIBUNAL ON OBJECTIONS TO JURISDICTION

Members of the Tribunal

Dr. Ahmed S. El-Kosheri, President

Professor James Crawford, Arbitrator

Professor Antonio Crivellaro, Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

Representing the Claimant

Messrs. Jean-Pierre Méan and
Andrea Rusca, SGS Société Générale
de Surveillance S.A.

Messrs. Emmanuel Gaillard and
John Savage, Shearman & Sterling

Representing the Respondent

Ms. Judith Gill and
Mr. Matthew Gearing
Allen & Overy

Professor Christopher Greenwood, QC

Undersecretary Mr. Manuel A. J. Teehankee
Department of Justice, Philippines

Assistant Secretary Mr. Emmanuel P. Bonoan
Department of Finance, Philippines

VII. THE ISSUES FOR THE TRIBUNAL

92. In the Tribunal's view, the arguments and submissions of the parties recited above raise five main issues:

(a) whether a contract for the provision of services performed mostly (but not wholly) outside the territory of the host State may nonetheless constitute an investment in its territory for the purposes of Article II of the BIT, having regard to the circumstances of the present case and the provisions of the CISS Agreement;

(b) whether the so-called "umbrella clause" (Article X(2) of the BIT) gives the Tribunal jurisdiction over essentially contractual claims against the Respondent State;

(c) alternatively, whether the general description of a "dispute concerning an investment" (Article VIII(1) of the BIT) encompasses claims of an essentially contractual character;

(d) whether the Tribunal can or should exercise jurisdiction in the present case, notwithstanding the exclusive jurisdiction clause, Article 12 of the CISS Agreement, requiring contractual disputes to be referred to the courts of the Philippines; and

(e) whether the Tribunal has jurisdiction over the present claims as claims for breach of treaty independently of the CISS, under Articles IV and/or VI of the BIT.

93. In addition, the Respondent argues that the BIT did not apply retrospectively to claims which arose prior to its entry into force on 23 April 1999. This argument cannot be considered until the Tribunal has identified which claims (if any) are properly before it, and the basis of its jurisdiction over such claims.

94. The parties disagreed on all five basic issues identified in paragraph 92, treating them all as questions going to jurisdiction. In the Tribunal's view there is no doubt that most of these issues are jurisdictional. The position is, however, less clear as to issue (d), the effect of Article 12 of the CISS Agreement. This may better be regarded as concerned with the admissibility of the

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[17] A Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment", (1997) 12 *ICSID Rev–FILJ* 287.

claim than jurisdiction in the strict sense. But there is no doubt that it is preliminary in character and the parties have treated it as such.

95. Each of these five issues was discussed at some length by the ICSID Tribunal in *SGS v. Pakistan*. In that case an Inspection Agreement between SGS and Pakistan, concluded in 1995, provided for analogous services to those in the present case. Less than two years after the Agreement entered into force it was purportedly terminated by Pakistan. The dispute between the parties concerned the validity and legal effect of the termination, as well as the adequacy of performance on both sides and outstanding financial claims. The Agreement contained an exclusive jurisdiction clause (Article 11) referring "[a]ny dispute, controversy or claim arising out of, or relating to" the Agreement to arbitration in Pakistan. In fact three different cases were brought: first, by SGS in the Swiss courts, then by Pakistan before the local courts to initiate a domestic arbitration under Article 11, and finally by SGS before ICSID (following the failure of the Swiss proceedings). SGS argued that the offer of ICSID arbitration in the Swiss-Pakistan BIT took priority over domestic arbitration under Article 11 of the Inspection Agreement, and that ICSID jurisdiction included claims both under the contract and under the BIT.

96. So far as the five questions enumerated in paragraph 92 above are concerned, the Tribunal in *SGS v. Pakistan* gave the following answers:[18]

(a) There was an investment "in the territory of the host State" within the meaning of the BIT because there had been an "injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the PSI Agreement."[19] It did not matter that most of SGS's expenses were incurred outside Pakistan: some expenditure in Pakistan had been "necessary to enable [SGS] to perform its obligations under the PSI Agreement"[20] and that was sufficient for this purpose. It was also relevant that, as described by Pakistan in the Swiss proceedings (in which it successfully claimed sovereign immunity) "the functions delegated to SGS" were considered as functions *jure imperii* performed in aid of the collection of tax revenue by Pakistan.[21]

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[18] A number of other questions were raised before the *SGS v. Pakistan* Tribunal (e.g. *lis alibi pendens*). These are not relevant to the present case.

[19] *SGS v. Pakistan,* para. 136.

[20] *SGS v. Pakistan,* para. 137.

[21] *SGS v. Pakistan,* paras. 138-9.

(b) Article 11 of the Swiss-Pakistan BIT, providing that each State Party "shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party", could not have the far-reaching effect of "automatically 'elevat[ing]' to the level of breaches of international treaty law" breaches of investment contracts entered into by the State.[22] Having regard to the distinction in principle between breaches of contract and breaches of treaty, contractual claims could only be brought under Article 11 "under exceptional circumstances".[23]

(c) The phrase "disputes with respect to investments" in Article 9(1) of the Swiss-Pakistan BIT does not encompass claims of an essentially contractual character. In the Tribunal's view, there was nothing "in Article 9 or in any other provision of the BIT that can be read as vesting… jurisdiction over claims resting *ex hypothesi* exclusively on contract".[24]

(d) The Tribunal's jurisdiction being limited to claims under the BIT, i.e. to claims for breaches of international obligations, that jurisdiction was not affected by the exclusive jurisdiction clause in the Inspection Agreement. Since the Tribunal lacked any purely contractual jurisdiction, there was no need to consider whether the effect of the BIT was to override exclusive jurisdiction clauses in contracts. Nor was it necessary to consider the effect of Article 26 of the ICSID Convention.[25] However the Tribunal expressed doubts that it could have been intended by general language in the BIT to "supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent."[26]

(e) In principle it was for the Claimant to formulate its claim: "if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits."[27] That was the case with SGS's claim against Pakistan. Accordingly the Tribunal had, and should exercise, jurisdiction

22 *SGS v. Pakistan,* para. 166.
23 *SGS v. Pakistan,* para. 172.
24 *SGS v. Pakistan,* para. 161.
25 *SGS v. Pakistan,* para. 174.
26 *SGS v. Pakistan,* para. 161.
27 *SGS v. Pakistan,* para. 145.

> over the Claimant's treaty claims as distinct from its contract claims, notwithstanding the pending arbitration of the contractual claims in Pakistan.[28]

97. This Tribunal will revert to these questions as they arise in the somewhat different legal and factual context of the present dispute. As will become clear, the present Tribunal does not in all respects agree with the conclusions reached by the *SGS v. Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT. This raises a question whether, nonetheless, the present Tribunal should defer to the answers given by the *SGS v. Pakistan* Tribunal. The ICSID Convention provides only that awards rendered under it are "binding on the parties" (Article 53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State.[29] Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision.[30] There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.

98. The Tribunal accordingly turns to the six questions identified in paragraphs 92 and 93 above.

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28 *SGS v. Pakistan,* para. 187-9.

29 See Schreuer, 1082, referring to earlier cases.

30 Indeed there is no guarantee that ICSID decisions will be published: see ICSID Convention, Art. 48(5).

the Slovak Republic. The Tribunal emphasised "the entire process" of economic activity, even though particular aspects of it were not locally performed.[43]

111. The most relevant decision is that in *SGS v. Pakistan*, where, as noted, the Tribunal held that equivalent pre-inspection services were provided "in the territory of the host State" because there had been an "injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the PSI Agreement."[44] The Tribunal agrees with this reasoning. Indeed the present case seems even stronger, given the scale and duration of SGS's activity and the significance of the activities of the Manila Liaison Office.

112. For these reasons the present Tribunal concludes that SGS made an investment "in the territory of" the Philippines under the CISS Agreement, considered as a whole. Moreover the present dispute concerns the service so provided and arises directly out of it, within the meaning of Article 25(1) of the ICSID Convention. There was no distinct or separate investment made elsewhere than in the territory of the Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionably an investment "in the territory of" the Philippines. Thus the present dispute falls within the scope of the BIT in accordance with Article II.

(b) Jurisdiction under the "Umbrella Clause": Article X(2)

113. On the footing that it had made an investment in the territory of the Philippines, the principal jurisdictional submission of SGS is that, having failed to pay for services due under the CISS Agreement, the Philippines is in breach of Article X(2) of the BIT, and that the Tribunal's jurisdiction is attracted by Article VIII(2) in respect of such breaches. The Philippines for its part denies that Article X(2) has such an effect, relying *inter alia* on the decision of the *SGS v. Pakistan* Tribunal on the equivalent BIT provision in that case.

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43 *Ceskoslovenska Obchodni Banka, AS v. The Slovak Republic*, Decision on Objections to Jurisdiction, (1999) 5 ICSID Reports 330, 356 (para. 88).

44 *SGS v. Pakistan*, para. 136.

114. One must begin with the actual text of Article X.[45] It is headed "Other Commitments". Article X(1) is a kind of "without prejudice" clause, providing that legislative provisions or international law rules more favourable to an investor shall to that extent "prevail over this Agreement". It deals with the relation between commitments under the BIT and distinct commitments under host State law or under other rules of international law. It does not appear to impose any additional obligation on the host State in the framework of the BIT.[46]

115. Article X(2) is different. It reads:

> "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."

This is not expressed as a without prejudice clause, unlike Article X(1). It uses the mandatory term "shall", in the same way as substantive Articles III-VI. The term "any obligation" is capable of applying to obligations arising under national law, e.g. those arising from a contract; indeed, it would normally be under its own law that a host State would assume obligations "with regard to specific investments in its territory by investors of the other Contracting Party". Interpreting the actual text of Article X(2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT.[47] Article X(2) was adopted within the framework of the BIT, and has to be construed as intended to be effective within that framework.

116. The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.

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[45] See paragraph 34. The BIT was concluded in English and French, with the English text prevailing in case of any "divergence of interpretation". Examination of the French text does not reveal any relevant divergence.

[46] The phrase "shall prevail over", used in relation to other commitments, may not have the effect of incorporating those commitments into a BIT. See *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB 01/1), (2003) 42 ILM 540, 556-7 (paras. 79-82).

[47] It was not suggested by the Respondent that Article X(2) only applies to obligations already assumed at the time of entry into force of the BIT. Like other provisions of the BIT, Article X is ambulatory in effect.

117. Moreover it will often be the case that a host State assumes obligations with regard to specific investments at the time of entry, including investments entered into on the basis of contracts with separate entities. Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State. But if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2).

118. The Respondent argued that, if Article X(2) does have substantive effect, it should be interpreted as being limited to obligations under other international law instruments.[48] But such a limitation could readily have been expressed. The argument accepted that Article X(2) may have operative effect, but read into that provision words of limitation which are simply not there.

119. This provisional conclusion—that Article X(2) means what is says—is however contradicted by the decision of the Tribunal in *SGS v. Pakistan*, the only ICSID case which has so far directly ruled on the question.[49] It should be noted that the "umbrella clause" in the Swiss-Pakistan BIT was formulated in different and rather vaguer terms than Article X(2) of the Swiss-Philippines BIT. Article 11 of the Swiss-Pakistan BIT provides that:

> "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

Apart from the phrase "shall constantly guarantee" (what could an inconstant guarantee amount to?), the phrase "the commitments it has entered into with respect to the investments" is likewise less clear and categorical than the phrase "any obligation it has assumed with regard to specific investments in its territory" in Article X(2) of the Swiss-Philippines BIT.

120. Nonetheless it is relevant to consider the reasons given by the Tribunal in *SGS v. Pakistan* for giving a highly restrictive interpretation to the "umbrella clause", in the context of the more

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48 Transcript, 26 May 2003, pp. 100-2.

49 See above, paragraph 96.

specific language of Article X(2), the provision the present Tribunal has to apply. Essentially there were four such reasons.

121. The first reason was textual. As the Tribunal noted, Article 11 could cover a wide range of commitments including legislative commitments; it went on to say that the interpretation favoured by SGS was "susceptible of almost indefinite expansion".[50] It is true that Article X(2) of the Swiss-Philippines BIT likewise is not limited to contractual obligations. But it is limited to "obligations… assumed with regard to specific investments". For Article X(2) to be applicable, the host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment—not as a matter of the application of some legal obligation of a general character. This is very far from elevating to the international level all "the municipal legislative or administrative or other unilateral measures of a Contracting Party."[51]

122. Secondly, the Tribunal applied general principles of international law to generate a presumption against the broad interpretation of Article 11. The principle relied on was that "a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law".[52] This principle is well established. It was affirmed by the *ad hoc* Committee in the *Vivendi* case, cited by the Tribunal.[53] But the Franco-Argentine BIT considered in the *Vivendi* case did not contain any equivalent to Article 11 of the Swiss-Pakistan BIT, and the *ad hoc* Committee therefore did not need to consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law. Certainly it might do so, as the International Law Commission observed in its commentary to Article 3 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.[54] The question is essentially one of interpretation, and does not seem to be determined by any presumption.

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50 *SGS v. Pakistan*, para. 166.

51 Ibid.

52 *SGS v. Pakistan*, para. 167.

53 *SGS v. Pakistan*, paras. 147-148, citing the *Vivendi Annulment* decision, (2002) 6 ICSID Reports 340, 365-7 (paras. 95-98, 101).

54 Commentary to Article 3, para. (7), referring to the possibility that "the provisions of internal law… are actually incorporated in some form, conditionally or unconditionally, into that [sc. the international] standard". See J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge, CUP, 2002) 89.

123. Thirdly, the Tribunal was concerned that the effect of a broad interpretation would be, *inter alia*, to override dispute settlement clauses negotiated in particular contracts.[55] The present Tribunal agrees with this concern, but—as will be seen—it does not accept that this follows from the broad interpretation of Article X(2).

124. Fourthly and subsidiarily, the Tribunal in *SGS v. Pakistan* found support for its conclusion in the fact that Article 11 is located at the end of the BIT, after the basic jurisdictional clauses, whereas if it had been intended to impose substantive international obligations it would more naturally have appeared earlier.[56] This factor is entitled to some weight, and it is the case that where it appears (as it does in only a minority of BITs) the "umbrella" clause is usually located earlier in the text.[57] But the Tribunal does not regard the location of the provision as decisive, having regard to the other considerations recited above. In particular, it is difficult to accept that the same language in other Philippines BITs is legally operative,[58] but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location.

125. Not only are the reasons given by the Tribunal in *SGS v. Pakistan* unconvincing: the Tribunal failed to give any clear meaning to the "umbrella clause". It treated Article 11 as signalling…

> "an *implied affirmative commitment* to enact implementing rules and regulations necessary or appropriate to give effect to a contractual or statutory undertaking in favor of investors of another Contracting Party that would otherwise be a dead letter. Secondly, we do not preclude the possibility that *under exceptional circumstances*, a violation of certain provisions of a State contract with an investor of another State might constitute violation of a treaty provision… enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party."[59]

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55 *SGS v. Pakistan*, para. 168.

56 *SGS v. Pakistan*, paras. 169-70.

57 E.g., United States-Poland, Treaty concerning Business and Economic Relations, Washington, 21 March 1990, Art. 2(6), final sentence; United States-Estonia, Treaty for the Encouragement and Reciprocal Protection of Investments, 19 April 1994, Art. 2(3)(c).

58 E.g., United Kingdom-Philippines, Agreement for the Promotion and Protection of Investments, 3 December 1980, Art. III(3); Netherlands-Philippines, Agreement for the Promotion and Protection of Investments, 27 February 1985, Art. III(3).

59 *SGS v. Pakistan*, para. 172 (emphasis added).

But Article 11, if it has any effect at all, confers jurisdiction on an international tribunal, and needs to do so with adequate certainty. Jurisdiction is not conferred by way of "an implied affirmative commitment" or through the characterisation of circumstances as "exceptional".

126. Moreover the *SGS v. Pakistan* Tribunal appears to have thought that the broad interpretation which it rejected would involve a full-scale internationalisation of domestic contracts—in effect, that it would convert investment contracts into treaties by way of what the Tribunal termed "instant transubstantiation".[60] But this is not what Article X(2) of the Swiss-Philippines Treaty says. It does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X(2) addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained.[61] It is a conceivable function of a provision such as Article X(2) of the Swiss-Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments—in effect, to help secure the rule of law in relation to investment protection. In the Tribunal's view, this is the proper interpretation of Article X(2).

127. To summarize, for present purposes Article X(2) includes commitments or obligations arising under contracts entered into by the host State. The basic obligation on the State in this case is the obligation to pay what is due under the contract, which is an obligation assumed with regard to the specific investment (the performance of services under the CISS Agreement). But this obligation does not mean that the determination of how much money the Philippines is obliged to pay becomes a treaty matter. The extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract.

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60 *SGS v. Pakistan*, para. 172.

61 This is not a novel distinction. It is made for example in the UNCTAD Study, *Bilateral Investment Treaties* (Graham & Trotman, NY, 1988) 55-6: "Its effect [sc. of the umbrella clause] is not to transform the provisions of a State contract into international obligations… However, it makes the respect of such contracts… an obligation under the treaty" (emphasis in original). The subsequent UNCTAD study, *Bilateral Investment Treaties in the Mid-1990s* (NY, 1998) 56, is less precise but likewise concludes that "as a result of this provision, violations of commitments regarding investment by the host country would be redressible through the dispute-settlement procedures of a BIT."

128. To summarize the Tribunal's conclusions on this point, Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the *extent* or *content* of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement. In the absence of other factors it could be decided by a tribunal constituted pursuant to Article VIII(2). The proper law of the CISS Agreement is the law of the Philippines, which in any event this Tribunal is directed to apply by Article 42(1) of the ICSID Convention. On the other hand, if some other court or tribunal has exclusive jurisdiction over the Agreement, the position may be different.

129. Before turning to that question, however, it is appropriate to ask whether the present Tribunal could exercise jurisdiction over contractual disputes concerning an investment by virtue of Article VIII(2) of the BIT, irrespective of any breach of the substantive provisions of the BIT. This issue was debated before the Tribunal and is potentially relevant, for example, in the context of the application of the BIT to claims arising before its entry into force.

(c) Jurisdiction over contractual claims: Article VIII(2)

130. Article VIII of the BIT provides for settlement of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party". If a dispute is not resolved by consultations between the parties pursuant to Article VIII(1), the investor may submit the dispute "either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration", and in the latter case, at the investor's option, to ICSID or UNCITRAL arbitration.

131. *Prima facie*, Article VIII is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State.[62] The term "disputes with respect to investments" ("différents relatifs à des investissements" in the French text) is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged

[62] Earlier drafts of what became Article VIII were similarly broad: e.g. Art. 10(1) of an earlier draft referred to "any dispute that may arise in connection with the investment".

expropriation contrary to Article VI of the BIT would be a "dispute with respect to investments"; so too would a dispute arising from an investment contract such as the CISS Agreement.

132. This *prima facie* conclusion is supported by a number of further considerations, both within the BIT itself and extrinsic to it:

(a) Each of the forums contemplated by Article VIII(2) (the national courts of the host State, ICSID panels and *ad hoc* tribunals established under the UNCITRAL Rules) has the competence to apply the law of the host State, including its law of contract. Indeed, if the BIT has not been implemented internally, the national courts may *only* be competent to apply their own law.

(b) The general term "disputes with respect to investments" may be contrasted with the more specific term "[d]isputes… regarding the interpretation or application of the provisions of this Agreement" in Article IX. If the States Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT, they would have said so expressly, using this or similar language.

(c) As noted already, the purpose of the BIT is to promote and protect foreign investments. Allowing investors a choice of forum for resolution of investment disputes of whatever character is consistent with this aim.[63] By contrast drawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty. It may be necessary to draw such distinctions in some cases, but it should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum.

(d) By definition, investments are characteristically entered into by means of contracts or other agreements with the host State and the local investment partner (or if these are different entities, with both of them). The specific link between investments and contracts is acknowledged by the line of cases dealing with pre-contractual claims. ICSID tribunals have been very reluctant to acknowledge that an investment has actually been made until the contract has been signed or at least approved and acted on.[64] Thus the phrase "disputes with respect to investments" naturally includes contractual disputes; the same is true of the

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63 See above, paragraph 116.

64 See, e.g., *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award of 15 March 2002, 6 ICSID Reports 308, 319-20 (paras. 48, 51) (entry into an investment coextensive with conclusion of a binding contract).

phrase "legal dispute arising directly out of an investment" in Article 25(1) of the ICSID Convention.

(e) In other investment protection agreements, when investor-State arbitration is intended to be limited to claims brought for breach of international standards (as distinct from contractual or other claims under national law), this is stated expressly. A well-known example is Chapter 11 of the North American Free Trade Agreement (NAFTA), under which investors may only bring claims for breaches of specified provisions of Chapter 11 itself.[65]

133. However, a different view of the matter was apparently taken by the ICSID Tribunal in *SGS v. Pakistan*, and it is necessary to consider the reasons given for their conclusion. The equivalent provision of the BIT in that case, Article 9, used the phrase "disputes with respect to investments": this is the same as Article VIII of the Swiss-Philippines BIT. The relevant passage of the decision reads as follows:

> "161. We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as 'disputes with respect to investments,' the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent. Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract. Both Claimant and Respondent have already submitted their respective claims sounding solely on the PSI Agreement to the PSI Agreement arbitrator. We recognize that the Claimant did so in a qualified manner and questioned the jurisdiction of the PSI Agreement arbitrator, albeit on grounds which do not appear to relate to the issue we here address. We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause *so far as concerns the Claimant's contract claims which do not also amount to BIT claims,* and it is a clause that this Tribunal should respect. We are not suggesting that the parties cannot, by special agreement, lodge in this Tribunal jurisdiction to pass upon and decide claims sounding solely in the contract. Obviously the parties

[65] To similar effect see e.g., the *Vivendi Annulment* decision, (2002) 6 ICSID Reports 340, 356 (para. 55). The issue there was a slightly different one, viz., whether in pursuing ICSID arbitration rather than local proceedings for breach of contract the investor had taken the "fork in the road" under the BIT. But it involved the interpretation of similar general language in the BIT.

> can. But we do not believe that they have done so in this case. And should the parties opt to do that, our jurisdiction over such contract claims will rest on the special agreement, not on the BIT.
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> 162. We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT."[66]

134. The present Tribunal agrees with the concern that the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself. On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements. But there are two different questions here: the interpretation of the general phrase "disputes with respect to investments" in BITs, and the impact on the jurisdiction of BIT tribunals over contract claims (or, more precisely, the admissibility of those claims) when there is an exclusive jurisdiction clause in the contract. It is not plausible to suggest that general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements. As will be seen, it is possible for BIT tribunals to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions.

135. Interpreting the text of Article VIII in its context and in the light of its object and purpose, the Tribunal accordingly concludes that in principle (and apart from the exclusive jurisdiction clause in the CISS Agreement) it was open to SGS to refer the present dispute, as a contractual dispute, to ICSID arbitration under Article VIII(2) of the BIT.[67]

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66 Emphasis in original.

67 The same conclusion was reached by an ICSID Tribunal in *Salini Costruttori SpA v. Kingdom of Morocco*, (2001) 6 ICSID Reports 398, 415 (para. 61).

(d) The exclusive choice of forum clause

136. The Tribunal turns to the question of the jurisdiction clause mutually agreed in the CISS Agreement and its impact on the present claim.

137. As noted already, Article 12 of the CISS Agreement provides that:

> "All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila."

Prima facie Article 12 is a binding obligation, incumbent on both parties, to resort exclusively to one of the named Regional Trial Courts in order to resolve any dispute "in connection with the obligations of either party to this Agreement". It is clear that the substance of SGS's claim, viz., a claim to payment for services supplied under the Agreement, falls within the scope of Article 12.

138. It has been suggested that in some legal systems, a clause referring to national courts or tribunals may be legally ineffective to confer or affect that jurisdiction, and should be construed as a mere acknowledgement of a jurisdiction already existing by virtue of the non-derogable law of the host State. This was suggested of the law of Argentina in the *Lanco* case.[68] But the Tribunal does not interpret Article 12 of the CISS Agreement as a mere acknowledgement which does not impose a contractual obligation upon SGS as to the use of the Philippines courts to resolve contractual disputes. SGS did not dispute that under Philippine law (the proper law of the CISS Agreement), a contractual stipulation to accept the exclusive jurisdiction of the Regional Trial Courts is effective in law and binding on the parties. In accordance with general principle, courts or tribunals should respect such a stipulation in proceedings between those parties, unless they are bound *ab exteriore*, i.e., by some other law, not to do so. Moreover it should not matter whether the contractually-agreed forum is a municipal court (as here) or domestic arbitration (as in *SGS v. Pakistan*) or some other form of arbitration, e.g. pursuant to the UNCITRAL or ICC Rules. The basic principle in each case is that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision.[69]

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[68] *Lanco International, Inc. v. Argentine Republic*, (1998) 5 ICSID Reports 367, 378 (para. 26). The Tribunal would observe, however, that the mere fact that "administrative jurisdiction cannot be selected by mutual agreement" does not prevent the investor agreeing by contract not to resort to any other forum.

[69] For an express provision see Article II(1) of the Claims Settlement Declaration, 19 January 1981, which expressly overrides exclusive jurisdiction clauses except for those relating to Iranian courts: 1 Iran-US CTR 9.

(i) Is the exclusive jurisdiction clause overridden by the BIT or the ICSID Convention?

139. Accordingly, faced with an exclusive jurisdiction clause in these terms, the first question must be whether the BIT or the ICSID Convention purport to confer upon investors the right to pursue contractual claims under the BIT disregarding the contractually chosen forum.

140. One possibility is that this right is conferred by Article VIII(2) of the BIT itself, which gives the investor a choice to submit the dispute "either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration", and in the latter case, a further choice between ICSID and UNCITRAL arbitration. The question is whether Article VIII(2) was intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned.

141. Two considerations lead the majority of the Tribunal to give a negative answer to this question.[70] The first consideration involves the maxim *generalia specialibus non derogant*. Article VIII is a general provision, applicable to investment arrangements whether concluded "prior to or after the entry into force of the Agreement" (Article II). The BIT itself was not concluded with any specific investment or contract in view. It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties. As Schreuer says, "[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application."[71] The second consideration derives from the character of an investment protection agreement as a framework treaty, intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.

142. It is suggested that, while BIT provisions for investor-State arbitration do not override exclusive jurisdiction clauses in later investment contracts, at least they have that effect for earlier

[70] Professor Crivellaro would give an affirmative answer, at least with respect to BITs which post-date the relevant contract. See his attached Declaration.

[71] Schreuer, 362.

contracts, by application of the maxim *lex posterior derogat legi priori*.[72] But there is no textual basis in the BIT for drawing such a distinction. The distinction would tend to operate in an arbitrary way: in the present case, for example, the BIT is renewable after 10 years and thereafter every five years (Article XI(1)); the CISS itself was renewed on the same terms as to dispute settlement on several occasions. In such circumstances, which is the prior agreement and which is the subsequent one? But the decisive point is that the *lex posterior* principle only applies as between instruments of the same legal character. By contrast what we have here is a bilateral treaty, which provides the public international law framework for investments between the two States, and a specific contract governed by national law. It must be presumed that whatever effect the BIT has on contracts it has on a continuing basis, as new contracts are concluded and new investments admitted. A distinction between earlier and later exclusive jurisdiction clauses in contracts cannot therefore be accepted—unless expressly provided for, which is not the case with the BIT which the Tribunal has to interpret.

143. For these reasons, in the Tribunal's view, the BIT did not purport to override the exclusive jurisdiction clause in the CISS Agreement, or to give SGS an alternative route for the resolution of contractual claims which it was bound to submit to the Philippine courts under that Agreement.

144. Alternatively, SGS argues that Article 26 of the ICSID Convention has this effect. Article 26 provides:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

It may be argued that, when the present proceedings were commenced in 2002, consent was thereby given by the parties to ICSID jurisdiction "to the exclusion of any other remedy", including that provided for in the CISS Agreement.

145. Unlike the argument considered above concerning the legal effect of the BIT, this argument at least has the merit that it identifies two agreements of the same character between the same parties, viz., Article 12 of the CISS Agreement and the later agreement to ICSID arbitration

[72] See, e.g., the discussion in *Lanco International, Inc. v. Argentine Republic*, (1998) 5 ICSID Reports

constituted by the terms of Article VIII of the BIT in association with the Request for Arbitration. In principle a later agreement between the same parties could override an earlier one. But SGS's argument depends upon a view of the intended meaning and effect of Article 26 which the Tribunal does not share, for three reasons.

146. First, it is not supported by the *travaux préparatoires* of Article 26, which make it clear that Article 26 was intended as a rule of interpretation, not a mandatory rule.[73]

147. Secondly, it ignores the phrase "unless otherwise stated" in Article 26. The question may be asked why the exclusive jurisdiction clause in the contract is not a contrary statement for this purpose. Article 26 is concerned with the consent of the parties to ICSID arbitration (not the consent of the States Parties to a BIT). In that context the immediately succeeding phrase "unless otherwise stated" must include a contrary statement or agreement by those parties. This is the conclusion reached by Schreuer:

> "This exclusive remedy rule of Art. 26 is subject to modification by the parties. The words 'unless otherwise stated' in the first sentence give the parties the option to deviate from it by agreement."[74]

Moreover he applies this principle not only to other forms of arbitration but also to domestic forum clauses:

> "Explicit reference to domestic courts means that the exclusive remedy rule of Art. 26 does not apply since the parties have stated otherwise."[75]

148. Thirdly, the view that Article 26 provides a mandatory override of previously agreed dispute settlement clauses would mean that in the common case under a BIT (such as the Swiss-Philippines BIT) where the parties have a choice between ICSID arbitration and UNCITRAL arbitration in respect of the same dispute, that choice would materially affect their legal rights. A party to a contract containing an exclusive jurisdiction clause would obtain an override if it opted for ICSID arbitration (by virtue of Article 26), but not if it opted for UNCITRAL arbitration (since

367, 377 (para. 24).

73 See the summary in Schreuer, 388-90.

74 Schreuer, 347.

75 Schreuer, 363.

the UNCITRAL Rules contain no equivalent provision). The Tribunal does not believe that this could have been intended.

(ii) Effect given to exclusive jurisdiction clauses in arbitral practice

149. Accordingly the Tribunal is faced with a valid and applicable exclusive jurisdiction clause, affecting the substance of SGS's claim. The question is whether this affects the Tribunal's jurisdiction or the admissibility of the claim.

150. The jurisprudence of mixed arbitral tribunals has not been entirely consistent, but the balance of opinion supports the conclusion that it does. For example, in the *Woodruff* case the United States-Venezuela Mixed Commission had jurisdiction over "[a]ll claims owned by citizens of the United States of America against the Republic of Venezuela", such claims to be decided "upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation".[76] The holders of Venezuelan railway bonds issued in 1859 made claims but were denied on the ground that by the terms of the bonds all controversies were to be "decided by the common laws and ordinary tribunals of Venezuela". The Umpire, Barge, rejected the argument that the Protocol of 1903 overrode the exclusive claims clause in the contract:

> "the judge, having to deal with a claim fundamentally based on a contract, has to consider the rights and duties arising from that contract, and may not consider a contract that the parties themselves did not make, and he would be doing so if he gave a decision in this case and thus absolved from the pledged duty of first recurring for rights to the Venezuelan courts, thus giving a right, which by this same contract was renounced, and absolve claimant from a duty that he took upon himself by his own voluntary action…"[77]

The Commission decided that "as the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission, the claim has to be dismissed without prejudice on its merits, when presented to the proper judges."[78]

151. The United States-Mexico General Claims Commission took a similar approach in the *North American Dredging Company of Texas* case. The Commission said:

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[76] See the United States-Venezuela Claims Protocol, 17 February 1903: 101 BFSP 646, 2 Malloy 1870.

[77] (1903) 9 RIAA 213, 222.

> "each case involving the application of a valid clause partaking of the nature of the Calvo Clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then wilfully ignores them by applying in such matters to his government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim."[79]

152. It is true that there are decisions apparently to the opposite effect, but mostly these depend on the existence of a provision overriding contractual forum clauses. For example, the Italian-Venezuelan Protocol of 13 February 1903 contained two salient provisions: in Article I, Venezuela expressly recognized "in principle the justice of the [Italian] claims"—this amounted in effect to an acknowledgement of indebtedness. Secondly, the Protocol was concerned with a defined class of existing claims; after dealing with certain of these specifically, it referred "all the remaining Italian claims, without exception" to the Mixed Commission.[80] In the *Martini* case, Arbitrator Ralston was able to rely on "the plain language of the protocol" in dismissing arguments based on a local forum clause.[81]

153. But it is one thing for a defined class of existing claims to be referred to an international tribunal "without exception", and another for a government to agree to the adjudication for the future of an indefinite range of cases in a number of different forums with different rules. The Tribunal cannot accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims. As the *ad hoc* Committee said in the *Vivendi* case:

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78 Ibid., 223. An earlier decision to similar effect is *Flanagan, Bradley, Clark & Co. v. Venezuela*, under the Convention between the United States and Venezuela of 5 December 1885, in Moore, *Digest of International Arbitrations* (1898) vol. IV, 3564, 3665.

79 (1926) 20 AJIL 800, 808 (para. 23); 3 ILR 292, 293. See also *Mexican Union Railway Limited (Great Britain) v. United Mexican States* (1930) 5 RIAA 115, 5 ILR 207; *El Oro Mining & Railway Co. Limited (Great Britain) v. United Mexican States* (1931) 5 RIAA 191, 6 ILR 201.

80 Art. IV. Art. VII dealt with bondholders' claims. For the text see 10 RIAA 479.

81 (1903) 10 RIAA 644, 663-4. Decisions of mixed arbitral tribunals under the Treaty of Versailles, 1919, were variable and depended on the interpretation of Article 304(b) of the Treaty, which could be regarded as overriding exclusive jurisdiction clauses in contracts: see, e.g., *Greek Government v. Vulkan Werke* (1925) 3 ILR 402.

> "where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract."[82]

(iii) Distinction between jurisdiction and admissibility

154. In the Tribunal's view, this principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense. The jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention. It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals,[83] they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as *force majeure*, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.[84]

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82 (2001) 6 ICSID Reports 340, 366 (para. 98).

83 Cf. *LaGrand Case (Germany v. United States of America)*, ICJ Reports 2001 p. 466 at 494 (paras. 77-78); ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Res 56/83, 12 December 2001, Art. 33(2).

84 It may be noted that the analogous rule of exhaustion of local remedies is normally a matter concerning admissibility rather than jurisdiction in the strict sense: I Brownlie, *Principles of Public International Law* (6th edn, Oxford, 2003) 681; CF Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge, CUP, 2004) 293-4..

(iv) Conclusion on Article 12 of the CISS Agreement

155. To summarise, in the Tribunal's view its jurisdiction is defined by reference to the BIT and the ICSID Convention. But the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim. The Philippine courts are available to hear SGS's contract claim. Until the question of the scope or extent of the Respondent's obligation to pay is clarified—whether by agreement between the parties or by proceedings in the Philippine courts as provided for in Article 12 of the CISS Agreement—a decision by this Tribunal on SGS's claim to payment would be premature.

(e) Is there a BIT claim independent of the CISS Agreement?

156. Before considering the implications of these findings for the present proceedings it is necessary to consider whether SGS has stated a case under the BIT which can be determined independently from the contractual issues referred to the Philippine courts by Article 12 of the CISS Agreement, a jurisdictional agreement which, for the reasons given, this Tribunal must respect.

(i) The general principle

157. In accordance with the basic principle formulated in the *Oil Platforms* case (above, paragraph 26), it is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on. On the other hand, as the Tribunal in *SGS v. Pakistan* stressed,[85] it is for the Claimant to formulate its case. Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim. By extension, in international arbitration a Claimant must state its claim in its

[85] See above, paragraph 96. See also *United Parcel Service of America, Inc. v. Government of Canada*, Decision on Jurisdiction, 22 November 2002, para. 33.

initial application, and wholly new claims cannot thereafter be added during the pleadings.[86] On the other hand, a Claimant is not limited to the facts set out in its Request for Arbitration: it may assert and prove additional facts, including those occurring at a subsequent time up to the closure of the proceedings, provided these fall within the scope of its original claim.[87]

158. The Tribunal would note that the dispute in *SGS v. Pakistan* appears to be a more complex one than the present, and that the *SGS v. Pakistan* Tribunal held it was not to be characterised as a merely contractual dispute.[88] That was certainly true in the *Vivendi* case, where the claim presented by the Claimant went beyond the scope of the concession agreement and involved allegations which, if proved, were capable of amounting to breaches of Article 3 or possibly Article 5 of the Franco-Argentine BIT. As the *ad hoc* Committee held:

> "the conduct alleged by Claimants, if established, *could* have breached the BIT. The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract…. It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT."[89]

159. By contrast the present dispute is on its face a dispute about the amount of money owed under a contract. SGS accepts that the provision of services under the CISS Agreement came to an end by effluxion of time. No question of a breach of the BIT independent of a breach of contract claim is raised (as, arguably, in *SGS v. Pakistan*); there is no allegation of a conspiracy by local officials to frustrate the investment (as in *Vivendi*). As presented to the Tribunal by the Claimant, the unresolved issues between the parties concern the determination of the amount still payable.

(ii) The BIT claims presented by SGS

160. In its Request for Arbitration SGS invoked Articles IV, VI and X(2).[90] Article X(2) having already been dealt with, the Tribunal turns to the remaining claims under Articles IV (fair

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86 See *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)* , ICJ Reports 1992 p. 240 at 265-70 (paras. 64-70).

87 See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections*, ICJ Reports 1998 p. 275 at 317-19 (paras. 96-101); *Request for Interpretation of the Judgment of 11 June 1998 in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Nigeria v. Cameroon), Preliminary Objections*, ICJ Reports 1999 p. 31 at 38 (para. 15).

88 *SGS v. Pakistan*, paras. 186-8.

89 (2001) 6 ICSID Reports 340, 370 (para. 112, emphasis in original). See also ibid., para. 114.

90 Request for Arbitration, paras. 38-41.

and equitable treatment) and VI (expropriation). It is convenient to deal first with the expropriation claim.

161. In the Tribunal's view, on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired.[91] A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.

162. Turning to Article IV (fair and equitable treatment), the position is less clear-cut. Whatever the scope of the Article IV standard may turn out to be—and that is a matter for the merits—an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV. As noted already (see paragraphs 36-41), the Philippines did appear to acknowledge that a large proportion of the amount claimed was payable. In the circumstances the Tribunal reaches the same conclusion on Article IV as it does on Article X(2). At the level of jurisdiction, a claim has in its view been stated by SGS under both provisions. But, there being an unresolved dispute as to the amount payable, for the Tribunal to decide on the claim in isolation from a decision by the chosen forum under the CISS Agreement is inappropriate and premature.

163. The Tribunal holds that it has jurisdiction over SGS's claim under Articles X(2) and IV of the BIT, but that in respect of both provisions, SGS's claim is premature and must await the determination of the amount payable in accordance with the contractually-agreed process.

164. In these circumstances it is not necessary for the Tribunal to consider whether Article 12 of the CISS Agreement is wide enough to encompass a claim under substantive provisions of the BIT, and what the legal consequences of an affirmative answer would be.

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91 Transcript, 27 May 2003, pp. 57-8.

(f) The retrospectivity issue

165. Finally, as noted above, the Respondent argued that the BIT did not apply retrospectively to claims which arose prior to its entry into force on 23 April 1999.

166. According to Article II of the BIT, it applies to investments "made whether prior to or after the entry into force of the Agreement". Article II does not, however, give the substantive provisions of the BIT any retrospective effect. The normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties applies: the provisions of the BIT "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty". The application of this principle to BIT claims was explored in some detail by a NAFTA Tribunal in *Mondev International Ltd. v. United States of America*.[92] As the Tribunal said (discussing the substantive standards under Chapter 11 of NAFTA): "events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach."[93]

167. It may be noted that in international practice a rather different approach is taken to the application of treaties to procedural or jurisdictional clauses than to substantive obligations. It is not, however, necessary for the Tribunal to consider whether Article VIII of the BIT applies to disputes concerning breaches of investment contracts which occurred and were completed before its entry into force. At least it is clear that it applies to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach.

168. In the present case the Tribunal has held that its jurisdiction in the present case depends primarily on Article X(2) of the BIT, which is a substantive and not merely a procedural provision. As to Article X(2), it is clear that the failure to observe obligations arising under the CISS Agreement could not have occurred before the recommendation made by BOC to the Secretary of Finance in December 2001 as to the total amount payable under the CISS Agreement.[94] This was well after the entry into force of the BIT, and there is accordingly no problem of the retrospective

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92 (2002) 6 ICSID Reports 192, 208-9 (paras. 68-70).
93 Ibid., 209 (para. 70).
94 See above, paragraphs 37-41.

application of the BIT in the present case. Similar considerations apply to SGS's case under Article IV of the BIT.

IX. THE TRIBUNAL'S CONCLUSIONS AND THEIR IMPLICATIONS FOR FURTHER PROCEEDINGS CONCERNING THE PRESENT DISPUTE

169. For the reasons given above, the Tribunal concludes as follows:

(1) SGS made an investment in the territory of the Philippines within Article II of the BIT. The present dispute is one with respect to that investment and arises directly from it (see above, paragraphs 99-112).

(2) Under Article X(2) of the BIT, the Respondent is required to observe the obligation to pay sums properly due and owing under the CISS Agreement; but this obligation is dependent on the amounts owing being definitively acknowledged or determined in accordance with the CISS Agreement (see above, paragraphs 113-129).

(3) Under Article VIII(2) of the BIT, the Tribunal has jurisdiction with respect to a claim arising under the CISS Agreement, even though it may not involve any breach of the substantive standards of the BIT (see above, paragraphs 130-135).

(4) But such a contractual claim, brought in breach of the exclusive jurisdiction clause embodied in Article 12 of the CISS Agreement, is inadmissible, since Article 12 is not waived or over-ridden by Article VIII(2) of the BIT or by Article 26 of the ICSID Convention (see above, paragraphs 136-155).

(5) No claim for breach of Article VI of the BIT can be sustained on the facts as presented by the Claimant (see above, paragraphs 156-164).

(6) SGS's claims under Articles X(2) and IV, in association with Article VIII(2), fall within the temporal scope of the BIT and are not excluded on grounds of retrospectivity (see above, paragraphs 165-168).

170. The effect of these findings is that SGS is bound by the terms of the exclusive jurisdiction clause, Article 12 of the CISS Agreement, in order to establish the quantum or content of the obligation which, under Article X(2) of the BIT, the Philippines is required to observe. This is a matter of admissibility rather than jurisdiction, and there is a degree of flexibility in the way it is

applied.[95] For example, evidently a party could not be required to litigate locally if the local courts are closed to it due to armed conflict.

171. Normally a claim which is within jurisdiction but inadmissible (e.g., on grounds of failure to exhaust local remedies) will be dismissed, although this will usually be without prejudice to the right of the claimant to start new proceedings if the obstacle to admissibility has been removed (e.g., through exhaustion of local remedies). However, international tribunals have a certain flexibility in dealing with questions of competing forums. In the *MOX Plant* case (*Ireland v. United Kingdom*) before an Annex VII Tribunal under the Law of the Sea Convention 1982, it emerged that a circumstance highly relevant to the question of the Tribunal's jurisdiction was the impending commencement of proceedings by the European Commission against Ireland in the European Court of Justice. The European Commission claimed that the matter in dispute fell exclusively within the jurisdiction of the European Court. Depending on the outcome of those proceedings, the Annex VII Tribunal might find itself without jurisdiction by virtue of Article 281 of the 1982 Convention. The Tribunal stayed its own proceedings pending determination of the issue by the European Court, proceedings which it called on the parties to expedite as far as lay within their power.[96]

172. More directly in point, perhaps, Pakistan argued that the Tribunal should adopt a similar procedure in *SGS v. Pakistan*. The Tribunal declined to do so because it held that there was no sufficient overlap between the BIT claims before it and the contractual claims before the Pakistan arbitrator.[97] In particular it noted that there was no need for "the factual predicate of a determination by the PSI Agreement arbitrator that either party breached that Agreement" in order to enable it to decide the BIT claims.[98]

173. Implicit in the discussion in *SGS v. Pakistan* is the view that an ICSID Tribunal has the power to stay proceedings pending the determination, by some other competent forum, of an issue relevant to its own decision. This Tribunal agrees. Article 19 of the ICSID Arbitration Rules

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95 An analogy may be drawn with the practice of national courts faced with claims such as *lis alibi pendens* and *forum non conveniens*, which are likewise not jurisdictional. See, e.g., the cases discussed by TL Stein in "Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal", (1984) 78 *AJIL* 1, 20-23.

96 *The MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3, (2003) 42 ILM 1187, 1199.

97 *SGS v. Pakistan*, paras. 185-89.

98 Ibid., para. 188.

gives the Tribunal general power to make orders required for the conduct of the proceeding, and this general power is confirmed by the second sentence of Article 44 of the Convention, in accordance with which:

> If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

174. The Tribunal notes that at the time the present arbitration was commenced, SGS had made substantial efforts to settle the claim through negotiations. Indeed a recommendation had been made by BOC to the Secretary of Finance of the Philippines as to the amount payable—a recommendation which the Secretary of Finance had appeared to accept.[99] SGS's Request for Arbitration clearly pleaded the failure to pay as a breach of the BIT, specifically Article X(2) and IV. But because of Article 12 of the CISS Agreement, it is for the Philippines courts to determine how much is payable, unless the parties themselves can reach a definitive agreement on SGS's claim. Thus this Tribunal is precisely faced with the situation where the Philippines' responsibility under Article X(2) and IV of the BIT—a matter which does fall within its jurisdiction—is subject to "the factual predicate of a determination" by the Regional Trial Court of the total amount owing by the Respondent.[100]

175. In the circumstances the Tribunal concludes that the circumstance of the fixing of the amount payable under the CISS Agreement—whether by definitive agreement between the parties or by proceedings before the courts of the Philippines—should not require the bringing of a new ICSID claim by SGS, but falls within the framework of SGS's existing claim in this arbitration.[101] That being so, justice would be best served if the Tribunal were to stay the present proceedings pending determination of the amount payable, either by agreement between the parties or by the Philippine courts in accordance with Article 12 of the CISS Agreement.

176. The stay of proceedings may be lifted for sufficient cause on application by either party. The Tribunal calls on both parties to expedite proceedings before the Philippine courts and, in general, to take all necessary measures to ensure a prompt and effective resolution of the dispute.

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[99] See above, paragraphs 37-41.

[100] Other questions could perhaps arise, even if the amount payable were to be determined by the Regional Trial Court: cf. *Russian Indemnity* case, (1912) 11 RIAA 431.

[101] See above, paragraph 157.

The parties are directed to report briefly to the Tribunal, either jointly or separately, at sixth-monthly intervals commencing 1 July 2004, on the steps being taken for the resolution of the present claim.